IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

THE GREYHOUND CORPORATION,
RESPONDENT

MOTION OF AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, AFL-CIO, FOR LEAVE TO FILE APPENDED BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

I. J. GROMPINE,
HERMAN STERNSTEIN,
WILLIAM B. PEER,
1001 Connecticut Avenue, N.W.,
Washington, D. C.
Attorneys for Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL-CIO

Of Counsel:
ZIMRING, GROMPINE AND STERNSTEIN,
1001 Connecticut Avenue, N.W.
Washington, D. C.

No. 844

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD,

PETITIONER

v.

THE GREYHOUND CORPORATION,

RESPONDENT

MOTION OF AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, AFL-CIO, FOR LEAVE TO FILE APPENDED BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

Comes now Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL-CIO (hereinafter "Amalgamated"), and moves the Court for leave to file the appended brief as amicus curiae in support of the petiton for a writ of certiorari filed by the Solicitor General on behalf of the Regional Director of the National Labor Relations Board in the above case.[1]

---

[1] Amalgamated, on February 21, 1963, sought consent of Respondent to the filing of a brief amicus curiae. Counsel for Respondent advised that Respondent would consent, *provided* that Petitioner consent to the filing of a brief amicus by Floors, Inc., if that party requests consent. Since Amalgamated has no control over whether Floors, Inc. will request consent to file a brief, amicus curiae, or whether the Solicitor General will grant consent, Amalgamated is proceeding on the assumption that, for the purpose of Rule 42 (3), consent by Respondent has been refused.

In accordance with Rule 42 (3), Amalgamated states the following in support of this motion:

1. Amalgamated is the labor organization which petitioned for the representation election directed by the National Labor Relations Board, the conduct of which was enjoined by the District Court, in an order which was affirmed by the Court below. As such, Amalgamated has a direct and vital interest in the review of the decision of the Court below that is the subject of the Petition for Certiorari. Amalgamated also expresses the interest of the employees involved in this proceeding who, since April 17, 1961 (when the representation petition was filed), have sought to be represented in collective bargaining, and are being denied the opportunity to select a collective bargaining representative by the holding of the Court below.

2. Amalgamated was granted permission to file a brief amicus curiae in the Court below. It was denied intervention, and was not permitted to argue.

3. In addition to the fact that Amalgamated has a direct interest in the subject matter of the instant Petition for Certiorari, this Motion should be granted because there are facts and issues of law, which may become relevant to a proper disposition of this case, and which, we believe, will not be adequately presented by the parties. This arises out of the following circumstances:

a. The decision of the Court below affirms an order of the District Court enjoining a representation election, which injunction was sought in an independent action brought by the Respondent employer.

b. The injunction was issued on the basis of a finding that the Board had exceeded its statutory authority in directing the election in question. The *per curiam* opinion of the Court below accepts, without more, "the principles there stated" and "the decision" of the District Court.

c. In the instant Petition for Certiorari, Petitioner limits the question presented to the issue of whether the District

Court had jurisdiction to enjoin the representation election in an action brought by the employer.

d. Amalgamated agrees that this question is of great importance; and, for all of the reasons stated by Petitioner, Amalgamated believes that certiorari should be granted, and that this Court should reverse the Court below and rule that the District Court was without jurisdiction to enjoin the representation election here involved.

e. However, Amalgamated further believes that, even if this Court were to rule, contrary to Petitioner, that in *Leedom* v. *Kyne*, 358 U.S. 184, this Court intended to open the door to the issuance by District Courts of injunctions against elections in actions brought by employers,[2] and, thus, even if this Court were to conclude that the District Court had jurisdiction to enjoin the election in this instance if the Board had exceeded its statutory authority, the District Court and the Court below erred in concluding that the Board had exceeded its statutory authority in directing the instant election.

f. Petitioner agrees that the District Court and the Court below erred in concluding that the Board had exceeded its statutory authority. (See Pet. p. 7) However, certain of the soundness of its position on the jurisdictional issue (and properly so), Petitioner chose to limit the question to that issue.

If, for any reason, this Court should sustain the decision below on this jurisdictional question, a proper disposition of this case, we submit, will require the Court to consider whether the Court below was correct in concluding that the Board had exceeded its statutory authority in directing the instant election.

It is to that issue that the appended brief is directed.

---

[2] What this Court said and did in its very recent opinion in *McCulloch* v. *Sociedad Nacional de Marineros, et al.*, 31 U.S. Law Week 4212 (February 18, 1963), strongly suggests that quite the opposite is true.

WHEREFORE, Amalgamated moves that leave be granted to file the brief appended hereto, as amicus curiae, in support of the petition for a writ of certiorari.

Respectfully submitted,

I. J. Gromfine,
Herman Sternstein,
William B. Peer,
1001 Connecticut Avenue, N.W.,
Washington, D. C.

Attorneys for Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL-CIO

Zimring, Gromfine and Sternstein
1001 Connecticut Avenue, N.W.,
Washington, D. C.
Of Counsel

February 1963

No. 844

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

THE GREYHOUND CORPORATION,
RESPONDENT

BRIEF OF AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, AFL-CIO, AS AMICUS CURIAE IN SUPPORT OF PETITION.

INDEX

AUTHORITIES

STATUTE

No. 844

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

THE GREYHOUND CORPORATION,
RESPONDENT

BRIEF OF AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, AFL-CIO, AS AMICUS CURIAE IN SUPPORT OF PETITION.

INTRODUCTORY STATEMENT

Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL-CIO, submits this brief in support of the petition for a writ of certiorari pursuant to leave of Court.

The interest of Amalgamated in this case has been set forth in the preceding Motion. As stated in that Motion, Amalgamated agrees with Petitioner that, even if it were to be assumed that the Board exceeded its statutory authority in directing the representation election here involved, the District Court was without jurisdiction to enjoin that election. In the argument that follows, however, Amalgamated will deal with the question that must be reached if, and only if, this Court should sustain the Court below on the jurisdiction issue—the question of whether the Court below properly concluded that the Board had exceeded its statutory power.

ARGUMENT

In Finding That Greyhound and Floors Constitute A Joint Employer and In Directing An Election In A Unit of The Employees Under The Joint Employer Relationship, The Board Acted in Accord With The Statute, and on The Basis of More Than Ample Evidence.

The Board found that "in view of the common control over the employees sought, we find both Greyhound and Floors to be their joint employer." (R. 11-12)[1]

The District Court (whose reasoning was adopted by the Court below), in enjoining the election directed by the Board, stated that:

> The Court is of the opinion that the findings of the Board, as recited, are, as a matter of law, insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining, its employees are not the employees of the plaintiff. (R. 61).

The basic fallacy in this reasoning is that it assumes that if it is determined that Floors stood in the relationship of an independent contractor with respect to Greyhound, the Board was precluded from establishing a bargaining unit based on a *joint employer* relationship between Greyhound and Floors. There is no basis in the statute or in the authorities for that assumption. The Board, in the decision here involved, has said, in effect, that even if it be assumed that Floors is an independent contractor, Greyhound maintains such a degree of common control over the particular employees in question as to warrant the conclusion that Greyhound and Floors are joint employers of those employees, and to warrant the establishment of a collective bargaining unit coextensive with that joint employer relationship.

---

[1] References are to the record in the Court below which has been certified to this Court.

Such an approach is clearly sanctioned by the Act. Section 9(b) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) provides:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the *employer* unit, craft unit, plant unit, or subdivision thereof . . . [Emphasis added.]

In Section 2(2), the Act defines "employer" to include "any person acting as an agent of an employer, directly or indirectly."

With that aspect of the definition of "employer" in mind, the Board has for many years directed elections in bargaining units comprising more than one company, even though the companies may be separate legal entities, or stand in the relationship of principal and independent contractor, where there is a substantial degree of common control over essential elements of the employment relationship of the employees in the bargaining unit.

One example of this approach can be found in a line of Board decisions in representation cases involving department stores which lease certain of their departments to a separate and independent enterprise. Where the facts demonstrate that the firm which owns and operates the store maintains a substantial degree of control over some of the critical aspects of the employment relationship, even though in other respects the lessees retain complete control, the Board has found both the store operator and the lessee to constitute joint employers, and has directed elections, exactly as it did here, in a unit of the employees who are subject to that joint control.

e.g. *Franklin Simon & Company, Inc. and Kayport Newport, Inc.*, 94 N.L.R.B. 576.
Macy's San Francisco and Seligman and Latz, Inc., 120 N.L.R.B. 69.

In like fashion the Board has consistently established a single, multi-employer bargaining unit comprised of several otherwise wholly independent companies which, by a history of formal or informal participation in joint collective bargaining, have demonstrated a common control over the employment relationship.

e.g. *Associated Shoe Industries of Southeastern Massachusetts, Inc.*, 81 N.L.R.B. 224.
Bunker Hill & Sullivan Mining & Concentrating Co., 89 N.L.R.B. 243.
Research Craft Manufacturing Corp., 129 N.L.R.B. 723.
Molinelli, Santoni & Freytes, 118 N.L.R.B. 1010.

The question of whether the term "employer," as that term is defined in the Act, may embrace more than one independent entity has frequently arisen in cases posing the issue of the liability of one company which has engaged in conduct affecting the employees of another company which, if committed by the other company, would constitute an unfair labor practice against those employees.

Such was the issue presented in *West Texas Utilities Company*, 108 N.L.R.B. 407. In that case, West Texas had contracted with Southwest Electric Company for some work to be performed at a power plant operated by West Texas. Southwest was required by its agreement with West Texas to furnish materials and labor, although West Texas reserved the right to require Southwest to "remove any employee from the work." West Texas was instrumental in having Southwest remove one Ray, an employee of Southwest, from the project under circumstances in which the Board found that Ray had been discriminated against because of his union activity. In ruling that West Texas was responsible for the unfair labor practice, the Board said:

> Moreover, we find that under the contractual relationship of the parties, the Respondent was an employer of Ray, within the meaning of Section 2(2) of the Act, which provides, in part, that "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly." The Respondent con-

tends, and *we agree, that the relationship of Southwest to the Respondent was essentially that of an independent contractor.* Normally, under such an arrangement, responsibility for the hire, pay, and discharge of employees on the job would be vested in Southwest. *Notwithstanding, in the present case an important part of the responsibility was delegated to the Respondent in the contractual clause which authorized the Respondent, in its discretion, to control the tenure of Southwest's employees on the project.* We conclude that in practical effect Southwest thereby designated the Respondent to act as its agent with respect to preventing or terminating the employment of any person who worked on the project. We accordingly find that the Respondent, in preventing Ray from being employed on the project, was acting as the agent of Southwest and is therefore responsible for the resultant unlawful discrimination.

Finally, in our opinion, the relationship between Southwest and the Respondent could *alternatively be viewed as that of dual employers insofar as the hire and tenure of employees on the project was concerned,* with Southwest having the primary right to hire and discharge and the Respondent having the contractual right to veto Southwest's determination in these matters. Thus, the Respondent *controls to a substantial degree a most significant aspect of the employment relationship* of persons on the project and we believe that it is an employer at least of persons, like Ray, over whom it effectively exercises such control. 108 N.L.R.B. at 413-414. (Emphasis added)

The Court of Appeals for the Fifth Circuit, the Court below in the instant matter, enforced the decision and order of the Board in a *per curiam* opinion, *N.L.R.B.* v. *West Texas Utilities Company*, 218 F. 2d 824 (C.A. 5), cert. denied, 349 U.S. 953. In so ruling, the Court acted in accord with two earlier decisions by that Court. In *N.L.R.B.* v. *Calcasieu Paper Company*, 203 F. 2d 12, 13 (C.A. 5), the Court enforced an order of the Board, noting, with approval, that:

Although the respondent companies are legally separate and distinct, the Board found that they constituted a single employer for the purposes of the Act.

A similar order of the Board was enforced by that Court in *N.L.R.B.* v. *Concrete Haulers, Inc.*, 212 F.2d 477, 479 (C.A. 5), where the Court stated:

> The evidence is clear that the two respondents constitute one employer within the meaning of the National Labor Relations Act. Where, in fact, the production and distribution are one enterprise, that enterprise as a whole is responsible for compliance with the Act, regardless of the corporate arrangements between themselves. The interdependence and integrated nature of the operations of the respondents, the common ownership of the stock, and the fact that the same officer administers a common labor policy, clearly indicate that there is only one employer for the purposes of this Act. *N.L.R.B.* v. *Condenser Corporation*, 3 Cir., 128 F.2d 67.

It will be noted that in *Concrete Haulers* the Court enforced, *inter alia*, an order of the Board directing the joint employers to bargain in a unit co-extensive with the joint employer relationship.

In the *Condenser* case cited by the Court below in *Concrete Haulers*, the Court of Appeals for the Third Circuit, stated the proposition in these terms (128 F.2d at 71):

> Under these circumstances we believe the relationship of these two corporations is such that an order pursuant to the provisions of the statute is proper against both, in view of the careful limitation which the Board has made with regard to the discharges. This is in no sense a penalty against the parties for an arrangement which is deemed by them to be in the interests of efficiency. It simply rests on the premise that where in fact the production and distribution of merchandise is one enterprise, that enterprise, as a whole, is responsible for compliance with the Labor Relations Act regardless of the corporate arrangements of the parties among themselves. What is important for our purpose is the degree of control over the labor relations in issue exercised by the company charged as a respondent. *Press Co., Inc.* v. *National Labor Relations Board*, 1940, 73 App. D.C. 103, 118 F.2d 937. Regardless of what Cornell says concerning its connection with Condenser's employees it appears that "to-

gether, respondents act as employers of those employees * * * and together actively deal with labor relations of those employees.'" *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 1938, 303 U.S. 261, 263.

See also: *N.L.R.B.* v. *Gibraltar Industries, Inc.*, — F. 2d —, 51 L.R.R.M. 2029 (C.A. 4).

Manifestly, therefore, the Board, having found that Greyhound and Floors exercise common control over the employees sought to be represented in this proceeding, acted properly and in accord with well established precedent in ruling that Greyhound and Floors were joint employers of these employees and in directing an election in an "employer" unit which embraced such of the employees of these two companies as are subject to this common control. The District Court and the Court below ignored the statutory provisions and precedents discussed above, and erred in concluding that an election on the basis of the joint employer relationship may not be directed if the facts show that Floors was an independent contractor.

What remains is the question of whether the Board acted reasonably and on the basis of evidence in concluding that there was "common control over the employees sought." Amalgamated submits that on that score the Board was correct beyond any possible doubt. The "short form" decision of the Board only sets forth some examples of the wealth of evidence in the record before the Board in support of that conclusion. What is set forth is sufficient to sustain that conclusion. However, should there be any doubt, Amalgamated will, in what follows herein, summarize the uncontroverted evidence that was before the Board showing the relationship between Greyhound and Floors as it affects the employees involved in this case.[2]

---

[2] In the summation of the evidence which follows, references designated "RB" are to the transcript of the testimony before the Board in this proceeding. This transcript is not now before this Court as part of the record certified to the Court. However, if this Court reaches this issue, and if it believes it necessary to review the

In this case Amalgamated sought a unit comprised of all porters, janitors, and maids employed at the bus terminals operated by The Greyhound Corporation (Southern Greyhound Lines Division) in Miami, St. Petersburg, Tampa, and Jacksonville, Florida.

In the operation of its interstate bus system, Greyhound maintains a number of terminals at which, in addition to ticket agents, baggage agents and related classifications, Greyhound utilizes the services of personnel classified as porters, janitors, and maids. (R.B. 118.)

Amalgamated represents, with a few exceptions, all of the drivers, maintenance employees, and terminal employees, of Greyhound. The current collective bargaining agreement between Greyhound and Amalgamated covers all of these classifications, and specifically covers the classifications of porters, janitors and maids. (R.B. 16-17, 19-20.) Thus, Amalgamated presently represents all porters, janitors, and maids at all of the terminals operated by Greyhound other than the four that are involved in this proceeding. (R.B. 231-233.)

In the case of the four terminals here involved—the terminals in Miami, St. Petersburg, Tampa, and Jacksonville—Amalgamated had represented the porters, janitors and maids as part of its overall unit until the time, commencing in 1954, when Greyhound entered into contractual arrangements with Floors to have the porter, janitor and maid work in those terminals performed by employees on the payroll of Floors. (R.B. 23.)

Floors is a wholly owned subsidiary of a Georgia corporation, engaged in the business of providing a great variety of building cleaning, maintenance, and allied services. (R.B. 240-246.)

---

record on which the Board's decision was based, a certified copy of that transcript has been lodged with the Clerk of this Court as an appendix hereto. Much of the evidence—particularly the actual agreement between Greyhound and Floors—is in the record now before the Court.

The history and details of the contractual arrangements between Greyhound and Floors pertaining to the four terminals involved can be summarized as follows:

1. On November 11, 1954, these parties entered into a written agreement [3] with respect to the terminal in Jacksonville. In that contract:

(a) Floors agrees to "provide and perform twenty-four (24) hour daily janitorial and loading services" at the terminal in question "in accordance with the description and definition of work" set forth in a statement (designated as "Schedule A") attached to the agreement. That statement describes in minute details just what cleaning services will be performed, and specifically notes that the daily cleaning services would be repeated as needed for proper results "by discretion of contractor . . . and in *agreement with the Terminal Management.*" i.e., in agreement with Greyhound. [Emphasis added.] (R. 18, 23)

(b) So far as the porter work is concerned, the statement attached to the schedule provides that Floors will supply "supervised labor, in uniform *approved by the Terminal Management,* in total amounts of man-hours daily to accomplish *the normally practiced services in the Greyhound Bus Terminal*" involving the handling of all baggage and express shipments, the loading and unloading of buses, and certain duties in connection with the servicing and cleaning of buses. [Emphasis added.] (R. 24)

(c) The contract provides for a minimum number of man-hours that will be supplied by Floors; but, more than that, it sets forth in the attached "Schedule A" a specific schedule of *individual assignments* of the employees to be supplied by Floors, *stating just what hours those employees will work each day and what their days off will be.* What is more, it provides that any changes in that schedule are "*subject to the approval of the Terminal Management.*"

---

[3] The terms of this agreement are set forth in the instant Record at pp. 17-26.

[Emphasis added.] This point is further emphasized in the body of the agreement (Section 2) which states that Floors agrees "that all work provided for herein shall be performed *on schedule to the satisfaction of the terminal management.*" [Emphasis added.]

(d) Greyhound, in that first agreement, agreed to pay Floors a flat sum, payable weekly, with the understanding that the stipulated amount would be reduced proportionately if there were any reductions in the man-hours per week below the agreed upon minimum established by Schedule A. Then, plainly recognizing that the agreement between the parties was really one for the supplying of specific hourly labor, the agreement provided (in Section 5) that Floors would keep detailed cost records and after a period of experience would "*promulgate an hourly rate for services performed*" to be offered for acceptance by Greyhound if it results in lesser cost than the flat weekly compensation.

(e) The agreement is *terminable by either party at will* by thirty days' written notice, with the further right of Greyhound to terminate without any notice "if unforeseen difficulties arise due to the existence of labor contracts." (R. 20)

2. On March 3, 1956 Greyhound and Floors entered into an amendment[4] of the 1954 Jacksonville agreement. In that contract:

(a) The schedule of hours of work to be supplied by the employees provided by Floors was changed "in fulfillment of said altered schedule as set forth this date *by the Terminal Manager* of the Jacksonville Greyhound Terminal." The parties then reaffirmed their agreement that the schedule of hours worked "shall be increased or decreased *by direction of the Terminal Manager, only,*" and provided for a specific *hourly* rate that would apply with respect to any increase in regularly scheduled hours over and above the agreed upon minimum that the terminal manager of Grey-

[4] This amendment is set forth in the Record. (R. 26-29.)

hound might authorize. [Emphasis added.] (R. 27)

(b) The parties then dealt with the problem of using the employees involved on overtime work. They were very specific in providing that all hours of overtime work "*shall be directed to be used, affected and operated as such by the Jacksonville Greyhound Terminal Manager, only.*" Not only did the parties agree that Greyhound would control the amount of overtime that would be worked; they even provided in the agreement for the precise premium that would be paid to any employee working overtime (see Section D, 1, (a) and (b)), and they provided (in Section E) that the approval of overtime by Greyhound would be in terms of *specific employees.* [Emphasis added.] (R. 27, 28)

3. On September 28, 1956,[5] Greyhound and Floors further amended their agreement with respect to the Jacksonville terminal. In that amendment the parties changed the method of compensation to what they termed a "cost-plus arrangement." Actually, however, it is clear that this is not a cost-plus arrangement in the usual sense of the term in which the contractor bills for all actual costs incurred, plus an agreed-upon percentage over and above those costs. Here, the agreement of September 28, 1956 (which must, of course, be read in the light of those provisions in the earlier agreements that were not modified), provides for a fixed maximum payment to be made by Greyhound for *each element* of the cost *including labor.* Thus, the agreement provides that the maximum weekly amount that is guaranteed is $1,519.52, of which 72 per cent represents the charge for labor, and any deviations from that guaranteed amount must conform to the percentage progressions. *Only such labor cost as is authorized by Greyhound may be charged for,* and above that Floors adds 28 percent for overhead and profit.

Here we have one of the most significant facts in this case, for this is the picture that emerges when we look at the

[5] This amendment is set forth in the Record before this Court at pp. 30-35.

contractual arrangement involved: Greyhound, by having to approve the work schedules, determines the number of porters, maids, and janitors that will be employed. Greyhound determines the minimum number of hours that these employees will work, and the extent to which any of them will work overtime. Greyhound determines the maximum it will pay for the total of all hours worked. As a result, in the clearest possible way, *Greyhound and not Floors, determines the wages of the employees we are concerned with in this case.*

4. On November 13, 1957,[6] Greyhound and Floors entered into an agreement to provide the same kind of services in the Miami terminal. In that contract the parties agreed to terms identical to those established with respect to the Jacksonville terminal. Plainly indicating the continuation of the principle that Greyhound fixes the work schedule of the particular employees involved is the statement in the letter from Greyhound to Floors that (R. 35-36):

> We further agreed that you would have one of your representatives meet me in Miami on November 22 to set up the work shifts and that it would be impossible to draw up a contract until we had worked our work shifts out and know the exact number of employees or manhours that you would have to furnish us.

The letter further makes it clear that the amount that Greyhound will pay to Floors will be directly related to the wage rate that Floors will pay to the employees involved. No profit is to accrue to Floors by being able to obtain labor at a rate less than it then anticipated; such savings are to be passed on directly to Greyhound. (See the fourth paragraph of the letter agreement of November 13, 1957.)

Finally, the agreement makes it clear that the Miami agreement, like the one in Jacksonville, is to be *terminable at will.*

---

[6] This agreement is set forth in the Record before this Court at pp. 35-36.

5. On January 24, 1958, Floors and Greyhound entered into an agreement applicable to the terminals in Tampa and St. Petersburg on exactly the same terms as those which were agreed to in the case of the Jacksonville and Miami terminals.[7]

Many of the porters, janitors, and maids now employed in the four terminals in question and covered by the instant petition are the same individuals who were employed before their work was "transferred" to Floors. (R.B. 148, 214, 224, 227-228.) And it is undisputed that the work of porters, janitors, and maids in these four terminals has continued to be performed in precisely the same manner as it had been done before, and as it continues to be done in all of the other terminals of Greyhound. (R.B. 34, 209, 276.)

The porters, janitors, and maids here involved punch the same time clock as is used by other Greyhound employees. (R.B. 101, 158, 222.) They wear uniforms identical in appearance to that worn by comparable employees of Greyhound in the other terminals except for the fact that they have very recently been required to add the insignia "Floors Inc. of Florida" to their shirts. (R.B. 62, 153.) Despite that additional designation, many of the porters continue to wear Greyhound insignia on their caps, a fact known to representatives of Floors and of Greyhound. (R.B. 62-63, 170.) Employees in the four terminals in question here supply their own uniforms, which is also true of porters, janitors, and maids in all other terminals operated by Greyhound. (R.B. 61, 152, 170.)

It is self-evident, and amply supported by the record, that the work performed by all of the employees covered by this petition comprises an *integral and essential part of the business of Greyhound.* The operator of an interstate bus system may or may not provide restaurant service in its terminals. It may or may not provide lockers, or a newsstand, or pin ball machines in its terminals. It may or may not

[7] This agreement is set forth in the Record before this Court at p. 37.

provide a pillow service for the passengers on its buses. But it *must* provide a terminal that is kept presentable; it *must* load and unload the baggage of its passengers which it *must* carry; and it *must* load and unload the express shipments, newspapers, etc., which are shipped by its freight customers, and which it *must* accept for shipment. This is not only a matter of sound business judgment; it is required by the laws and regulations under which a bus system such as Greyhound operates. (R.B. 32-33, 106-111.)

What is more, as the record also clearly establishes, passengers or shippers who have claims for damage to baggage or express shipments look *to Greyhound and not to Floors* for recovery. Floors carries no insurance to cover such claims; Greyhound accepts all responsibility in that area. Greyhound recognizes that it is still responsible and it makes no effort to advise any passengers or express customers that their baggage and express is being handled in Miami, Tampa, St. Petersburg or Jacksonville by employees with any different status than that of the porters in any other terminals. (R.B. 30-31, 91, 126, 127-129.) It stands to reason that when a passenger deals with a porter in one of those four terminals he assumes that he is dealing with a *Greyhound* porter. He is in a *Greyhound* terminal. He knows nothing of an entity known as "Floors, Inc." and he looks to *Greyhound* for the service he expects. (R.B. 278-279.)

Under these circumstances, it is reasonable to expect to find that in the four terminals where it has contracted with Floors, Greyhound *retains complete, specific, and detailed control over the manner in which the work performed by the personnel supplied by Floors is performed.* And that is precisely what obtains. We have already seen above how the basic written agreements between Greyhound and Floors give Greyhound complete control over the number of employees that will be utilized, the shifts they will work, the overtime that will be worked, and the wages that will be paid. The record demonstrates that in practice that control

is in fact exercised The Greyhound terminal managers determine the exact number of employees that will be used on each shift; they must approve of any overtime payments or the use of extra help (R.B. 30, 44-45, 53-55, 75, 99-100, 114, 123-125, 131-132, 160-163); and the president of Floors admitted at the hearing that *he would have to obtain the approval of Greyhound before he could give his employees working in the Greyhound terminal a wage increase.* (R.B. 252-253.)

Nor is that control limited to matters affecting the number of employees and their compensation. Floors has a supervisor in Miami, in Jacksonville, and one who covers both Tampa and St. Petersburg; but in each instance that supervisor is also responsible for the supervision of other Floors projects; in no instance is he present in the Greyhound terminal at all times; and the record shows that several days may pass in which the Floors supervisor is not present in the Greyhound terminal at all. (R.B. 87, 88, 147, 211-212, 218, 277.) But more important is the fact that Greyhound, despite its agreement with Floors, regards the Greyhound terminal manager as the boss of the terminal, responsible in every way for the work performed by all employees in the terminal whether they are paid by Greyhound or paid by Floors. In that connection, the ranking Greyhound official testified at the hearing as follows:

> "Q. Well, let's examine into this supervisory business. Do they [the Greyhound Terminal Managers] concern themselves at all with how the baggage is handled and how the express is handled and what procedures and so forth will be followed?
>
> "A. Certainly if the job is not being handled properly they concern themselves with it because they are still managers of the terminal.
>
> "Q. Right, do they instruct Floors, Incorporated, as to how they want that work done?
>
> "A. They do. Floors, Incorporated, supervisors.
>
> "Q. Do they tell them specific details as to how that work will be done?
>
> "A. Why sure." (R.B. 35.)

Greyhound makes no distinction in the standard of conduct, or in the details of performance, that it expects of the personnel supplied by Floors as compared to that of other identical employees in the other terminals that it operates. (R.B. 8-70.) As evidence of the fact that Greyhound maintains complete control over the way in which the work is done by personnel supplied by Floors, the record shows:

1. That the Greyhound terminal managers give, orally or in writing, specific and detailed instructions to the Floors supervisors as to how they want the work done and what changes they want in the manner in which the job is done. When written instructions are issued by the Greyhound terminal managers, the Floors supervisors post them, and the porters, janitors, and maids are expected to read and comply with those instructions. (R.B. 88-89, 93-99.) A review of the examples of specific instruction set forth in the cited record references readily demonstrates that they cover not just the end result but *the precise manner in which the end result to be achieved.*

2. That all parties understand that where there is a conflict between any instructions the terminal manager has issued and any the Floors supervisor has promulgated the employees are expected to comply with the instructions of the Greyhound terminal manager. (R.B. 60-61, 112, 148-151.)

3. That on many occasions—particularly, of course, when the Floors supervisor is not present—the employees in question receive their instruction and supervision directly from the terminal managers or from other Greyhound employees. (R.B. 105, 116-117, 199-201, 210-211.) As one Greyhound official testified: "Of course, we are in the business of handling passengers and somebody would have to tell that Floors' porter what to do." (R.B. 59.)

4. That the Greyhound terminal managers have the *authority (and have exercised the authority) to order Floors to remove an employee that they consider undesirable* and no longer wish to have employed in the terminal. On no occasion has such an order been refused. (R.B. 36, 90-92, 177,

193.) In the same manner, Greyhound terminal managers have the authority *to refuse to permit Floors to hire an employee* it considers undesirable for employment in any of the Greyhound terminals. (R.B. 36-37.)

On the record before the Board, as summarized above, the finding by the Board that Greyhound and Floors exercise common control over the employees involved is more than justified. Indeed, it is the minimum that the Board could find. For, on that record, we submit that the Board would have been eminently justified in concluding that Floors was not an independent contractor,[8] and that Greyhound was the real employer of the employees involved. The Court of Appeals for the Fifth Circuit, in accord with well established precedent, has noted that:

> It is generally stated in the authorities that the distinction between an independent contractor and an employee is found in the nature and the amount of control reserved by the person for whom the work is done. And that an employment relationship exists "whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished . . ." *N.L.R.B.* v. *Steinberg*, 182 F.2d 850, 855 (C.A. 5).

It would be difficult to conceive of a case in which the person for whom the services are performed retains more complete control over the manner in which the work is performed. In its arrangement with Floors, Greyhound has done no more than add a level of routine supervision over the porters, maids and janitors that did not exist before.

---

[8] The decision in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO*, v. *Greyhound*, 231 F. 2d 585 (C.A. 5), does not require a different result. The sole issue in that case was whether Greyhound had violated its agreement with Amalgamated by entering into the contract with Floors. The issue of whether Floors was an independent contractor within the meaning of the Act had not been litigated in the lower Court, and the facts which show the extent to which Greyhound controls not only the end result but the means by which that result is accomplished had not then been known.

The fact that the work involved is an on-going, integral part of Greyhound's business and not just an incidental related aspect, the fact that the work is done on the premises of Greyhound and integrated with the work of other Greyhound employees, the fact that the work is identical to that performed in other Greyhound terminals and is the same as was done by these employees while on Greyhound's payroll, the fact that Greyhound determines the number of employees that are used, the shifts they will work, and the amount of overtime that will be worked, the fact that Greyhound retains the right to prohibit Floors from employing in its terminals any particular employees Greyhound does not desire, the fact that Greyhound effectively determines what wages will be paid to the employees, leaving to Floors not a risk-type profit, but a fixed fee for overhead and administration, the fact that Greyhound continuously instructs Floors supervisors as to the most minute details concerning the performance of the work with the understanding that those instructions will be conveyed to the employees, the fact that Greyhound officials themselves have frequent occasion to directly supervise the work, particularly on the regularly occurring instance when Floors supervisors are not present, and the fact that the contract between Greyhound and Floors is terminable at will—all these lead inescapably to the conclusion that Greyhound retains that degree of control over the means and manner in which the result is accomplished which negates any independent contractor relationship.

Amalgamated commends to the attention of this Court a well reasoned District Court opinion in a case involving the contracting out of terminal work by a sister subsidiary of the Greyhound Corporation. In *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52, the Court dealt with an alleged violation of the Fair Labor Standards Act by an individual (A. F. Sink) with whom Southwestern Greyhound had entered into an agreement for the operation of one of its terminals. Southwestern Greyhound disclaimed

any liability on the ground that Sink was an independent contractor and that the terminal employees involved were employees of Sink and not of Southwestern Greyhound. On facts which are certainly no more persuasive than those involved here, the Court rejected this contention and found that Sink and his employees were employees of Greyhound under the very same common law test that is applicable here. The Court said (65 F. Supp. at 55):

> From the facts above stated no conclusion can be reached other than that Sink *is an employee of defendant and not an independent contractor.* Notwithstanding the broad definition of an "employee" within the meaning of the Fair Labor Standards Act, under such facts, Sink is an employee of defendant *even when measured by the standards of the common law.* Under its contract with Sink defendant had the *"right to control" Mr. Sink as to the details of the duties performed by him in the operation of its depot.* Its District Passenger Agent and Auditor make recommendations and gave to Mr. Sink orders concerning the conduct of the business at the depot. In its contract defendant specifically retained "control of expenses" incurred in the operation thereof. Defendant provided the means by which Mr. Sink and the other employees at the depot perform their duties. *The occupation, in which Mr. Sink and said other employees were engaged, was not distinct in character, separate and apart from defendant's general interstate business but was an integral and essential part thereof.* The occupation of Mr. Sink was one that is usually performed by a Station Master and required no particular skill. Defendant furnished and supplied the instrumentalities and the place where such duties were performed. The method of paying Mr. Sink's compensation and the term of his employment were continuous. He was not paid by the job nor for specified duties; *he was paid to operate the station in accordance with the usage and custom of defendant's public carrier business and all of his activities and duties, as well as those of the other employees at said depot, were amenable to the custom and control defendant exercised over its entire inter-*

> *state business.* Defendant's tariffs and its operating schedules were dependent, in part, on the duties performed by Mr. Sink and the other employees at said depot. Under such circumstances Mr. Sink is and was an employee of defendant under the common law. *Skidmore* v. *Haggard*, 341 Mo. 837, 110 S.W. 2d 726; *Barnes* v. *Real Silk Hosiery*, 341 Mo. 563, 108 S.W. 2d 58; *State ex rel Chapman* v. *Shain*, 347 Mo. 308, 147 S.W. 2d 457; Restatement of the Law of Agency, Vol. 1, p. 483. Mr. Sink, being an employee of defendant under common law standards determining that relationship, there can be no question that he is an employee of defendant within the meaning of the Fair Labor Standards Act. *National Labor Relations Board* v. *Colten*, 6 Cir. 105 F. 2d 179; *National Labor Relations Board* v. *Blount*, 8 Cir. 131 F. 2d 585; *Southern Ry. Co.* v. *Black*, 4 Cir. 127 F. 2d 280. [Emphasis added.]

The Board could well have found that Floors was not an independent contractor with respect to the particular employees here involved. *A fortiori*, it acted reasonably and properly in determining that Greyhound and Floors exercise such a degree of common control as warrants treating the two companies as joint employers of these employees, and justifies the establishment of a collective bargaining unit coextensive with that joint employer relationship.

CONCLUSION

We respectfully submit that, for all of the reasons stated in the Petition, a writ of certiorari should issue in this cause, and the decision of the Court below should be reversed on the jurisdictional ground urged in the Petition. If, however, this Court should rule that the Court below did not err in affirming the jurisdiction of the District Court, we submit that it should then rule, for the reasons stated in this brief, that the Court below erred in concluding that the Board had exceeded its statutory authority in directing the instant election.

Respectfully submitted,

I. J. Gromfine,
Herman Sternstein,
William B. Peer,
1001 Connecticut Avenue, N.W.,
Washington, D. C.

Attorneys for Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL-CIO

Zimring, Gromfine and Sternstein
1001 Connecticut Avenue, N.W.,
Washington, D. C.
Of Counsel

February 1963